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**MAILED**

DEC 12 2011

In re Patent No. 6,604,324	:	OFFICE OF PETITIONS
Issue Date: August 12, 2003	:	
Application No. 09/444,546	:	DECISION ON PETITION
Filed: November 22, 1999	:	
Atty. Dkt. No. 29967US1	:	

This is a decision on the petition under 37 CFR 1.378(b), filed November 6, 2011, to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f).** The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued August 12, 2003. The 7.5 year maintenance fee could have been paid from August 12, 2010 through February 12, 2011, or with a surcharge during the period from February 13, 2011 through August 12, 2011. Accordingly, the patent expired August 12, 2011, for failure to timely submit the maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item requirement (1) set forth above.

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 41(c)(1).

Patentee appears to attribute the failure to timely pay the second maintenance fee to financial hardship wherein patentee states:

“Due to the present market conditions in which we sell our products, we have been faced with unavoidable cash flow which prevented us from paying this maintenance on time.”

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". See, 35 U.S.C. § 41(c)(1). Acceptance of late payment of a maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e. "unavoidable delay". Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995)(quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)). Decisions on reviving abandoned applications have adopted the "reasonably prudent person" standard in determining if the delay in responding to an Office action was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-515 (D.C. Cir. 1912); and Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141. In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

As 35 U.S.C. § 41(b) requires the payment of the fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees. Ray v. Lehman, 55 F.3d at 609, 34 USPQ2d at 1788. That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 C.F.R. § 1.378(b)(3) requires a showing of the steps taken by the responsible party. Id.

Petitioner must establish that petitioner was aware of the need to pay the maintenance fee, and to that end was tracking it, or had engaged someone to track it before the expiration, but when the fee came due, petitioner was "unavoidably" prevented from making the maintenance fee payment due to financial hardship. Petitioner has failed to satisfy this burden of proof.

Petitioner has failed to establish the existence of financial hardship. Petitioner has provided no documentary evidence of the alleged financial hardship. Further, petition has failed to indicate when such financial hardship commenced and/or ended. Moreover, petitioner has failed to establish a nexus between any alleged financial hardship and the failure to timely remit the maintenance fee payment.

In view of the lack of documentary evidence or detailed declaration of facts, it cannot be found that the entire period of time, from the time that the maintenance fee was due until the filing of a grantable petition, was unavoidable. Accordingly, the petition to reinstate the patent must be dismissed.

Petitioners may request a refund of the previously submitted surcharge and maintenance fee. Petitioners may request a refund by writing to the Finance Office, Refund Section. A copy of this decision should accompany any request for refund.

Any renewed petition must establish that the entire period of delay from the time that the maintenance fee was due until the time of the filing of a grantable petition has been unavoidable. Petitioner is reminded that any renewed petition should entail an exhaustive effort to establish that the failure to timely pay the maintenance fee was unavoidable as after reconsideration pursuant to 37 CFR 1.378(e), no further reconsideration regarding unavoidable delay will be undertaken. Petitioner may provide any and all documents and declaration so fact that he wishes the Office to consider prior to making a decision on the request for reinstatement of the patent

#### **ALTERNATE VENUE**

Petitioner may wish to consider submitting a petition stating that the failure to timely remit the maintenance fee was unintentional pursuant to 37 CFR 1.378(c). Any petition to accept an unintentionally delayed payment of a maintenance fee filed under paragraph (a) of this section must be filed within twenty-four months after the six-month grace period provided in § 1.362(e) and must include: (1) The required maintenance fee set forth in § 1.20 (e) through (g); (2) The surcharge set forth in § 1.20(i)(2); and (3) A statement that the delay in payment of the maintenance fee was unintentional.

Enclosed please find as a courtesy a copy of PTO/SB/66. Petitioner is advised that the surcharge required under 37 CFR 1.378(c)(2) is currently \$1,640.00 and **is not** subject to waiver. The small entity 7.5 year maintenance fee is currently \$1,425.00. The effective date of fee increase is September 26, 2011. If desired, the previously submitted fee totaling \$2,880.00 can be used in connection with a petition filed pursuant to 37 CFR 1.378(c). However, any request for reconsideration would require the submission of the remaining fee due.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of address should be filed in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record. Enclosed please find PTO/SB/123 which may be used to effect a proper change in correspondence address before the Office.

Telephone inquiries concerning this matter may be directed to the undersigned at 571-272-3205.

*/ALESIA M. BROWN/*

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Enclosures